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No. 85-786

In the Supreme Court of the United States

October Term, 1985

ELIZABETH L. BELLISSIMO,
Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE ISSUE PRESENTED FOR REVIEW

DID PETITIONER CARRY HER BURDEN UNDER *TEXAS DEPARTMENT OF COMMUNITY AFFAIRS V. BURDINE*, 439 U.S. 248 (1981), OF PROVING THAT THE LEGITIMATE, NONDISCRIMINATORY REASON PROFFERED BY HER EMPLOYER FOR HER DISCHARGE WAS PRETEXTUAL?

Petitioner has also sought certiorari on an additional issue based upon *Parklane Hosiery Co. v. Shore*, 439 U.S. 332 (1979), but that issue was never raised in the Court of Appeals and was not decided by that Court.

STATEMENT OF CORPORATION AFFILIATION

The following is a listing of all non-wholly owned subsidiaries and affiliates of Westinghouse Electric Corporation:

Compagnie des Dispositifs Semiconducteurs Westinghouse (CDSW)
Electrocontroles Villares, Ltda. (EVL)
Electronic Office Centers of America Corporation
Eletromar Industria Electrica Brasileira, S.A.
Email Limited
Ercole Marelli & Company, S.p.A.
Escorts, Ltd.
Franco Tosi S.p.A.
Galileo Argentina C.I.S.A.
Galileo Uruguaya, S.A.
Industria IEM, S.A. de C.V.
Innovative Technologies, Inc.
Maihak A. G. (H.)
Mecanica Pesada, S.A.
Mex Control S.A. de C.V.
Mictron, Inc.
Mitsubishi Electric Corporation
Mitsubishi Nuclear Fuel Co., Ltd.
Motores Electricos de Juarez S.A. de C.V.
O'Connor Combustor Corporation
Perceptics
Powerex, Inc.
Schneider S.A.
Sentec Corporation
Serratosa & Castello, S.A.
Siam di Tella, Ltd. (Argentina)
Siam di Tella, Ltd. (Uraguay)
Silectra S.A. de C.V.

Siliconix, Inc.
Speech Plus
Theta J Corporation
Toshiba Westinghouse Electronics Corporation
Turbine Metal Technologies, Inc.
Tyree Industries Limited
United Western Technologies Corp.
Vektron S.A.
W. S. Insulators
WM Power Products, Inc.
Westinghouse Canada Inc.
Westinghouse Projectos Electricos, S.A. (WEPESA)
Westinghouse, S.A.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Westinghouse Electric Corporation and Gerald B. Marcovsky, submit this brief in opposition to the Petition for Writ of Certiorari filed by Petitioner Elizabeth L. Bellissimo, Appellee below, in the action captioned *Elizabeth L. Bellissimo v. Westinghouse Electric Corp., a corporation, Robert J. McGrath, and Gerald B. Marcovsky, Individuals*, No. 84-3375. The Opinion of the United States Court of Appeals for the Third Circuit is published at 764 F.2d 175 (3d Cir. 1985).

PERTINENT STATUTES

Section 703(a) of Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, 78 Stat. 253 (1964), as amended, 42 U.S.C. § 2000e-2(a), provides, in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Section 6(d)(1) of the Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56 (1963), 29 U.S.C. § 206(d), provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment

> for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Section 11 of the Portal to Portal Act, Pub. L. 49-52, 61 Stat. 84 (1947), as amended, 29 U.S.C. § 260, provides:

> In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

COUNTERSTATEMENT OF THE CASE

This is an action brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e)-2(a), by a female attorney, Elizabeth Bellissimo, against her employer, Westinghouse Electric Corporation, and her

supervisor, Attorney Gerald Marcovsky.[1] Bellissimo alleged discriminatory discharge and discriminatory treatment in matters including salary. The district court held that the discharge had been discriminatory but that there was no violation of Title VII with regard to Bellissimo's salary.[2]

There was no appeal by Bellissimo of the district court's holding regarding her salary claim. Westinghouse and Marcovsky appealed the adverse Title VII holding to the United States Court of Appeals for the Third Circuit, where a unanimous three-judge panel reversed the district court. The Third Circuit held that Bellissimo had failed to prove that she was treated differently than were male attorneys in her department, that the insubordinate behavior she demonstrated to her supervisor would have resulted in discharge regardless of sex and that there was no basis for the district court's finding that the legitimate, nondiscriminatory reason established by Westinghouse for Bellissimo's discharge was pretextual. The finding of sex discrimination by the district court was, therefore, held to be clearly erroneous. A petition for rehearing *en banc* was denied.

SUMMARY OF ARGUMENT

Pursuant to Rule 17 of the Rules of the Supreme Court of the United States, review on a writ of certiorari should not be granted in this case because the decision of the Court of Appeals does not conflict with any decision of

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[1]Robert J. McGrath was named as a defendant in the Complaint filed in this action. He was not a party to the appeal in the Third Circuit.

[2]The Complaint in this case also raised a claim based upon an alleged violation of the Equal Pay Act, 29 U.S.C. § 206(d). This claim was tried to a jury, which found in Bellissimo's favor, resulting in a judgment in the amount of $1,016. As discussed, *infra*, the district court refused to award liquidated damages on this claim.

this Court or other courts of appeal on the same matter and does not present an important issue of federal law.

Petitioner's first argument in support of certiorari is primarily factual in nature, seeks to reargue the evidence in the case; and raises no special or important issues. This was a case of an individual attorney challenging the treatment she received in a corporate law department. The case is significant only to the parties involved. Contrary to the allegations of the Petition, the case does not entail broad-reaching issues of discrimination against women in the professional and managerial ranks. The holding of the Third Circuit, that Petitioner produced no evidence to prove that the reason for her discharge was pretextual, does not constitute a departure from the established judicial precedent of this Court or of the other circuit courts.

The second issue Petitioner raises concerning the "obverse" of the Court's holding in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), was not raised or addressed in the Court of Appeals. Moreover, no exceptional circumstances exist to warrant review of that issue. Even if the issue were ripe for review, it would not be a basis for reversal of the Court of Appeals. The district court held, with respect to the Equal Pay Act violation, that Westinghouse acted in good faith and established that it had reasonable grounds for believing that it was in compliance with the law. This finding is incompatible with a finding of an intent to discriminate, which is necessary for a violation of Title VII under the theory of disparate treatment.

REASONS FOR DENIAL OF THE WRIT

A. Petitioner's First Argument in Support of Her Petition Is No More Than an Inaccurate and Incomplete Recitation of the Evidence Raising No Important or Novel Issues.

Rule 17 of the Supreme Court Rules states that review on a writ of certiorari will be granted only where there are special and important reasons therefor. The Petition in this case does not raise any such reasons. Rather, in order to obtain review Petitioner has resorted to presenting a sensationalized, slanted and highly selective recounting of facts. The Petition has overstated the importance of this case. It presents no novel or substantial issues worthy of review. As this Court stated in *United States v. Johnston*, 268 U.S. 220, 227 (1925), "We do not grant a certiorari to review the evidence and discuss the specific facts."

The district court held that the reason proferred by Westinghouse for Bellissimo's discharge was pretextual. A unanimous three-judge panel of the Third Circuit reversed the district court, holding that there was no basis for the district court's finding.

The Third Circuit begain its review in this case by recognizing that this Court's recent decision in *Anderson v. City of Bessemer*, ___ U.S. ___, 105 S.Ct. 1504 (1985) mandates great deference to the district court's findings of fact in a discrimination case. However, the court concluded that this was an instance in which a comprehensive review of the entire record was appropriate for the appellate court. Upon review of that record, the court held that Bellissimo had failed to prove that her employer's proffered reason for her discharge, i.e., her inability to get along with her supervisor, was pretextual. The court held that

Bellissimo's attempted proof was legally insufficient in that she failed to offer any evidence that she was treated in a manner different from male employees.

The Third Circuit's analysis and conclusions on review were consistent with the dictates of this Court and with the holdings of other circuit courts. Nothing distinguishes this case from the multitude of Title VII cases passing through the courts each day. Accordingly, nothing in this case justifies a grant of certiorari.

This case is distinguishable from *Pullman-Standard, Div. of Pullman, Inc. v. Swint*, 456 U.S. 273 (1982), in which the Court held that the court of appeals should have remanded the case to the district court for additional findings rather than make its own contrary findings of fact. In this case, the Circuit Court made no findings of fact. Rather it merely held that the record contained no evidence of disparate treatment, which could have sustained the district court's holding of sex discrimination under Title VII. The complete lack of evidence in the record to support a finding of disparate treatment made remand unnecesssary.

The Third Circuit was able to review a record in which the relevant facts were essentially undisputed. It applied the Title VII analysis enunciated by this Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and followed by the Third Circuit. *See Dillon v. Coles*, 746 F.2d 988 (3d Cir. 1984); *Duffy v. Wheeling-Pittsburgh Steel Corp.*, 738 F.2d 1393 (3d Cir. 1984) *cert. denied*, ___ U.S. ___, 105 S.Ct. 592 (1985); *Lewis v. University of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983) *cert. denied*, ___ U.S. ___, 105 S.Ct. 266 (1984); *Massarsky v. General Motors Corp.*, 706 F.2d 111 (3d Cir.)

cert. denied, 464 U.S. 937 (1983). Under the *Burdine* analysis, the plaintiff has the burden to prove a prima facie case of discrimination by a preponderance of the evidence. That proof is easily made. The Court of Appeals here held that the district court had correctly found that a prima facie case had been established. (40a). The burden then shifted in accordance with the *Burdine* analysis to Westinghouse to proffer a legitimate, nondiscriminatory reason for the employment action taken. The Third Circuit affirmed the district court's finding here that such a legitimate reason had been shown by Westinghouse. (41a). That showing disspelled any inference of discrimination. *Burdine*, 450 U.S. at 254-55. Thereafter, if Bellissimo was to prevail on her Title VII claim, she was required to prove that the alleged reason was pretextual. *Burdine*, 450 U.S. at 256. It is that burden which Bellissimo failed to carry in this case. Having found no evidence to prove pretext, the Third Circuit was required by *Burdine* to reverse the district court's finding of discrimination.

Bellissimo does not take issue with the standard applied by the Third Circuit here. Instead, in the absence of a legal issue to raise, Bellissimo uses her Petition simply to reargue the evidence of the case. In so doing, she misstates that evidence. She attempts to sensationalize the case in order to draw the attention of this Court. In actuality, this was not a sensational case. Nor is it a far-reaching precedent affecting women holding professional or managerial positions, as argued in the Petition. It was only a case of a female employee refusing to accept job-related criticism by her supervisor under the same standards by which male employees were measured.

The Petition inaccurately depicts a working relationship between Bellissimo and Marcovsky as one in which

Marcovsky's only criticisms of Bellissimo were directed to her clothes and her dancing with a "colleague." Those criticisms were made on only one occasion more than six months before Bellissimo's discharge. Furthermore, the issues raised by those criticisms were, as observed by the Third Circuit, well within the realm of any supervisor's concerns. (47a-48a).

It is of obvious note that the Petition fails to mention the many categories of evidence pertaining to the legitimate, nondiscriminatory reason for Bellissimo's discharge. For example, the Petition fails to mention the criticism Bellissimo received for her repeated tardiness in reporting to work, her substandard working hours, her failure to complete her work in a timely manner, her demand to be paid a greater salary for working more than forty hours per week, her reluctance to attend client meetings, and her tardiness in attending an important client meeting, which ultimately led to her dismissal.

The Petition not only misstates and omits specific facts, it also attempts to raise factual issues never raised on appeal. More particularly, the Petition attempts to resurrect Bellissimo's salary claim under Title VII which was defeated at the district court level. To this end, the Petition also suggests some inequity in salary payment to all law department female attorneys. That allegation was never a part of this case. The Title VII salary claim in this case was the claim of one female attorney—a claim that was rejected by the district court, from which no appeal was taken by Bellissimo. No claims were raised or litigated concerning other female attorneys.

The two subjects emphasized in the Petition—dress style and social conduct while travelling on company business—did not present the dramatic or pervasive conflict

described in the Petition. Marcovsky on one occasion suggested that Bellissimo tone down her dress style. There was no evidence of fascination or preoccupation with Bellissimo's shoes, skirts or any other element of her wardrobe as alleged in the Petition. Such was not even alleged in Bellissimo's testimony.

As articulated by the Court of Appeals, Marcovsky's advice to Bellissimo in regard to her attire reflected the standard of a conservative corporate law department in which dress was an important element of the image maintained. Male attorneys similarly had been counselled to follow a conservative dress style. The Third Circuit held, as have other circuit courts, that dress is an appropriate area of supervisory concern and that dress codes do not offend Title VII as long as they are evenly enforced. *See Andre v. Bendix Corp.*, 774 F.2d 786, 797 (7th Cir. 1985); *Baker v. California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974) *cert. denied*, 422 U.S. 1046 (1975); *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753 (9th Cir. 1977); *Fagan v. National Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973).

Marcovsky's counselling of Bellissimo concerning their client's complaint about her public behavior on a business trip was also not a significant event in their overall work relationship and did not play a part in Bellissimo's discharge. Marcovsky advised Bellissimo that her conduct while on that business trip in dancing with a client in a cocktail lounge and leaving with him in the presence of other clients apparently had created a negative impression with the clients who had complained to him about her behavior. (230a-231a; 785a-789a). The Petition overly dramatizes this event, incorrectly characterizes the male

involved as a "colleague" rather than a client, and exaggerates the testimony in an attempt to imply that this case is worthy of this Court's attention.

Based upon its review of the entire record in this case, the Court of Appeals found no evidence of disparate treatment violative of Title VII and therefore held that the district court's finding of a Title VII violation was clearly erroneous. It is not feasible or appropriate for this Court to review every case in which an employee alleges sex discrimination but in which the lower court has found no evidence of disparate treatment.

A holding that there is no Title VII violation where the record reveals that males and females have received the same treatment is neither startling nor novel and does not stand in contrast to the holdings of this Court or the other circuit courts of appeals. Consequently, certiorari should be denied.

B. The Issue Petitioner Attempts to Raise Based on Parklane Hosiery Co. v. Shore Was Not Raised or Addressed Below; Moreover, It Is Irrelevant to the Holding of This Case.

The Petition raises as a proposed issue for review in this case whether the Third Circuit's decision conflicts with this Court's decision in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), as well as decisions of other circuits, on the question of whether a jury's findings in an action at law are binding on a judge in a simultaneously-tried equitable action. The Court should decline to grant certiorari on this issue because it was never raised or addressed in the Third Circuit, and for the additional reason that a decision on this issue would not affect the disposition of this case.

As noted previously, this case involved an Equal Pay claim, as well as claims of disparate treatment under Title VII. In one Title VII claim, Bellissimo alleged that she had been terminated discriminatorily. As a separate basis for relief, she alleged disparate treatment in matters including salary. Bellissimo prevailed on her Equal Pay claim and was awarded $1,016. The trial judge, in accordance with Rule 52 of the Federal Rules of Civil Procedure, issued findings of fact and conclusions of law on the Title VII claims, in which he found that Bellissimo's discharge was discriminatory, based on several factors other than salary, but that Bellissimo had failed to prove her salary claim under Title VII. Accordingly, the district court denied Bellissimo's requested relief on her Title VII salary discrimination claim. Bellissimo did not appeal from the trial court's adverse findings on her Title VII salary claim.[3] Only Westinghouse and Marcovsky filed an appeal in this case.

The Court of Appeals subsequently reviewed the evidence pertaining to those factors relied upon by the trial judge to show discrimination, and found no disparate treatment based on sex. Since Bellissimo had not appealed her Title VII salary claim, the Court of Appeals was not called upon to reach the propriety of the trial court's findings on that issue. Bellissimo's failure to raise that issue in the appeals court also precluded that court from finding the application of collateral estoppel to be inappropriate in this case based upon the significant differences between the Equal Pay Act and Title VII with respect to issues, procedures and burdens of proof.

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[3]The district court's decision with regard to Bellissimo's Title VII salary claim significantly reduced the amount of the monetary damages awarded to her on her discharge claim. Thus, Bellissimo had an incentive to appeal or cross-appeal from the district court's decision on her Title VII salary claim, but she elected not to do so.

Bellissimo seeks to do indirectly what she failed to do directly. In arguing that the Court of Appeals was bound to treat the findings of the jury on her Equal Pay claim as preclusive on the issue of disparate treatment in her Title VII claim, she really seeks to overturn the trial court's finding of no salary discrimination. She thus raises for the first time in her Petition an issue which she could have raised but did not raise in the Court of Appeals.

Time and again, this Court has refused to entertain issues on certiorari when those issues were not raised in the lower courts. In *Jordan Mining Co. v. Société Anonyme Des Mines*, 164 U.S. 261 (1896), the Court stated:

> We have repeatedly held that the failure to present and insist upon errors assigned in the court below constitutes an abandonment, or waiver, of all errors assigned, not vital to the question of jurisdiction or the foundation of the right; and this court can only be called upon to consider such assignments as are pressed upon the attention, or noticed in the opinion of the court below.

Id. at 264-65. *See Magruder v. Drury*, 235 U.S. 106, 113 (1914) ("[a]lleged errors not of a fundamental or jurisdictional character, which were not presented to the appellate court for consideration, and which were waived, either expressly or by implication, will not be regarded as before this court"); *Montana Railway Co. v. Warren*, 137 U.S. 348, 351 (1890) (". . . mere matters of error may always be waived, and they are waived when the attention of the reviewing court is not called to them").

Although it has jurisdiction to reach issues not addressed by the lower courts, this Court has traditionally been extremely reluctant to do so, and will review questions that have not been raised in the lower courts only in

"exceptional cases." *Lawn v. United States*, 355 U.S. 339, 362, n.16 (1958); *Duignon v. United States*, 274 U.S. 195, 200 (1927); *Husty v. United States*, 282 U.S. 694, 701, 702 (1931). Thus, in *Adickes v. S. H. Kress and Company*, 398 U.S. 144 (1970), the Court declined to review a district court's refusal to permit a plaintiff to amend her complaint to include a count under the Civil Rights Act of 1875, because that issue was never raised or considered by the Court of Appeals. 398 U.S. at 147, n.2. In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), the Court similarly declined to consider the issue of whether a jury's finding that Monsanto had "created" certain practices as part of a price-fixing conspiracy were supported by sufficient evidence, because Monsanto had failed to raise the issue in the Court of Appeals. 465 U.S. at 759 n.6. In *Brandon v. Holt*, ___ U.S. ___, 105 S.Ct. 873 (1985), the Court refused to consider a municipality's argument that the record did not establish the factual prerequisites for imposing liability on it under 42 U.S.C. § 1983, because the Court of Appeals had not addressed the issue. 105 S.Ct. at 879, n.25. *See also Berkemer v. McCarty*, ___ U.S. ___, 104 S.Ct. 3138, 3152-53 (1984); *Youngberg v. Romeo*, 457 U.S. 307, 316, n.19 (1982); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Dothard v. Rawlinson*, 433 U.S. 321, 323, n.1. (1977).

The cases in which the Court has granted review on issues not raised in the lower courts are rare. In each such case, the Court has identified "exceptional circumstances" justifying review. *See, e.g., United States v. Mendenhall*, 446 U.S. 544 (1980); *Carlson v. Green*, 446 U.S. 14 (1980); *Youakim v. Miller*, 425 U.S. 231 (1976). No such "exceptional circumstances" have been shown to exist in this case.

Contrary to the assertions in the Petition, no conflict among the circuits even arguably exists by virtue of the decision in this case since the issue alleged to be "conflicting" was never raised or addressed in the Court of Appeals.

Finally, it must be stressed that the issue raised in the Petition would not warrant reversal in this case even if decided in Bellissimo's favor. As the Court of Appeals properly noted, Bellissimo's burden as plaintiff in a disparate treatment case under Title VII was to persuade the court that she had been the victim of intentional discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). On the other hand, "The Equal Pay Act creates a type of strict liability; no intent to discriminate need be shown." *Strecker v. Grand Forks County Social Service Board*, 640 F.2d 96, 99, n.1 (8th Cir. 1980). *Accord Patkus v., Sangamon-Cass Consortium*, 769 F.2d 1251, 1260, n.5 (7th Cir. 1985).

Since intent is not an element of an Equal Pay violation, the finding of a violation of that Act does not imply a finding that the employer intentionally discriminated and does not necessarily bring with it a finding of a Title VII violation. Consequently, even if, as Bellissimo argues, the jury's verdict on her Equal Pay claim is to be accorded preclusiveness in the Title VII action, that verdict did not establish, either expressly or through implication, that Westinghouse's conduct was intentional, which is a prerequisite for finding a violation of Title VII.

Indeed, the trial judge in this case found just the opposite to be true. He refused to award Bellissimo liquidated damages on her Equal Pay claim, based upon his determination that "Defendant Westinghouse acted in good faith and established that there were reasonable grounds for believing that it was in compliance with the Equal Pay

Act . . . ." (23a). This factual determination decided an issue that is properly before the trial judge rather than the jury in an Equal Pay Act case, for that Act specifically confers the trial court discretion to deny liquidated damages when satisfied that the employer acted "in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [Act]." 29 U.S.C. § 260. *See Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 464 (D.C. Cir. 1976) *cert. denied*, 434 U.S. 1086 (1978). This finding of the trial court was clearly incompatible with a finding that Westinghouse intentionally discriminated against Bellissimo with respect to pay under Title VII. For this reason, as well as Bellissimo's failure to raise this issue in the Court of Appeals, certiorari should be denied.

CONCLUSION

For the reasons stated above, Respondents request that certiorari be denied.

Respectfully submitted,

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